IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

THURSDAY, THE 5TH JULY 2007 / 14TH ASHADHA 1929

Crl.Rev.Pet.No. 2344 of 2005(C)

C.C. NO. 150/98 OF THE JFCM - V, KOZHIKODE
CRL. APPEAL NO. 317/03 OF THE SESSIONS COURT, KOZHIKODE

REVN. PETITIONER: APPELLANT/ACCUSED:

PARAMBILTHODI CHANDRAN,
S/O. KUNHAN @ KARI, ITTAPURATH MEETHAL
LAKSHAM VEEDU COLONY, PARUTHIPPARA,
VELIPARAM AMSOM DESOM.

BY ADV. SRI.P.S.SREEDHARAN PILLAI

RESPONDENTS: COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 22-6-2007 THE COURT ON **05/07/2007,** PASSED THE FOLLOWING:

V.RAMKUMAR,J.

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CRL.R.P. NO. 2344 OF 2005

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Dated, this the 5th day of July, 2007

O R D E R

In this Revision filed under Section 397 read with Sec. 401 Cr.P.C. the revision petitioner who was the accused in C.C 150 of 1998 on the file of the J.F.C.M – V., Kozhikode for offences punishable under Sections 354 and 377 I.P.C. challenges the conviction entered and the sentence passed against him concurrently by the courts below.

2. The case of the prosecution can be summarised as follows:-

On 1-5-1999 at about 10.30 a.m 41 year old accused namely Parambilthodi Chandran induced six year old P.W.2 (Mumthaz) a female minor girl to the bedroom of his house and subjected her to carnal intercourse against the order of nature after outraging her modesty. The accused has thereby committed offences punishable under Sections 354 and 377 I.P.C.

3. On the accused pleading not guilty to the charge framed against him by the trial Magistrate for the

aforementioned offences, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 13 witnesses as P.Ws 1 to 13 and got marked 10 documents as Exts. P1 to P10 and 3 material objects as MOs 1 to 3.

4. After the close of the prosecution evidence, the accused was questioned under Sec. **313 (1)**(b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence. He had the following to submit before Court:-

The accused as well as the de facto complainant are both residing in the Ittappuram Four Cent Colony. The other residents of the said colony used to walk along the pathway passing along the boundary of the de facto complainant's house for the purpose of having access from the Paruthipara road. The colony people had constituted a committee for the widening of the above pathway. The accused who is a B.J.P. worker was the President of the said committee. The de facto complainant who was opposed to the proposal for widening the pathway had on many occasions asked the accused to withdraw from the said proposal.

He had also requested the accused to prevail upon the other members of the committee in this behalf. The de facto complainant was wrecking vengeance on the accused for not obliging him. To achieve the above end he was misusing his daughter by foisting a false case against the accused. On the date and time of the alleged occurrence himself, his wife and two children had gone to the house for Mannarickal Dasan for attending a marriage. They had gone for the wedding at 10 '0 clock in the morning and returned home only at 1 p.m. Until then he was in the house of marriage along with his wife and children. During his absence from the house, his aged mother was at home and Reeja the daughter of his elder brother Velayudhan was also there to give company to his mother. Barring the said two persons, nobody else was in his house. He has absolutely nothing to do with the alleged occurrence. He is completely innocent.

5. When called upon to enter on his defence, he examined his wife as D.W.1 and Reeja as D.W.2.

6. The learned Magistrate, after trial as per judgment dated 17-5-2003 found the revision petitioner guilty of the offences charged against him. For the conviction under Sec. 354

I.P. C. he was sentenced to undergo rigorous imprisonment for two years. For the conviction under Sec. 377 I.P.C. the revision petitioner was sentenced to rigorous imprisonment for three years and to pay a sum of Rs. 25,000/- to P.W.2 the victim by way of compensation under Sec. 357 (3) Cr.P.C. with a default sentence of simple imprisonment for two months. An appeal preferred by the revision petitioner as Criminal appeal No. 317 of 2003 on the file of the I Addl. Sessions Court, Kozhikode was dismissed as per judgment dated 18-5-2005. It is the said judgments which are assailed in this Revision Petition.

7. I heard the learned counsel appearing for the revision petitioner and the learned Public Prosecutor.

8. The only point which arises for consideration in this Revision is as to whether the conviction entered and the sentence passed against the revision petitioner are sustainable or not ?

9. THE POINT:

P.W.1 (M.K. Mohammed) is the father of the victim. P.W.2 (Mumthaz) is the victim who was aged six years at the time of occurrence. PW3 (Saleena) is the elder sister of P.W.2. She is an attester to Ext.P2 seizure mahazar pertaining to MO 1 frock and

MO 2 frock and underwear of PW2 recovered by the police from her house. P.W.4 (Alavi) is another attester to Ext.P2 seizure mahazar. P.W.5 (Rajan @ Premarajan) is yet another attestor to Ext.P2 seizure mahazar. He, however, turned hostile to the prosecution. P.W.6 (Khadeeja) is the mother of P.W.2 the victim. P.W.7 (Musthafa) is an attester to Ext.P3 scene mahazar. P.W.8 (Kannan) is also an attestor to Ext.P3 scene mahazar. P.W.9 (Dr.Thomas Mathew) examined the accused on 2-5-1997 at 2.40 p.m. and issued Ext.P5 potency certificate. P.W.10 (Dr.Umadevi) is the doctor who examined P.W.2 at 5 p.m. on 3-5-1997 and issued Ext.P5 wound certificate. P.W.11 (Thankamany) was the Assistant Chemical Examiner who proved Ext.P7 certificate of chemical analysis pertaining to MOs 1 to 3. P.W.12 (Raheem) is a witness to Ext.P4 seizure mahazar dated 3-5-1997 pertaining to MO3 lungi of the accused. P.w.13 (Sajeevan) was the Sub Inspector of Feroke who investigated the offence. D.W.1 (Sulochana) is the wife of the accused. D.W.2 (Reeja) is the niece of the accused.

10. The learned counsel appearing for the revision petitioner made the following submissions before me in support of the revision:-

P.W.1 the father of the victim had a grouse against the accused who was the President of the committee constituted for widening the pathway passing behind the property of P.W.1. P.W.1 was opposed to the proposal for widening. P.W.3 has admitted that there was such a dispute regarding the pathway. P.w.6 has also admitted that there was a committee for widening the pathway. It was out of the above enmity that P.w.1 was making use of his own daughter to wreck vengeance on the accused. There was inordinate delay in lodging the complaint. P.W.1 claims to have reached home at 7 p.m. on the date of occurrence namely 1-5-1997. Still the complaint has been lodged only at 1.30 p.m. on the next day. Even according to P.W.1 there had been an earlier attempt of sexual assault by the accused on his daughter. If so, why did P.W.1 allow his daughter to play in the house of the accused? A reading of the deposition of P.W.2 shows that there was no voir dire examination of the child witness. While according to the prosecution, the accused had enticed her to his house, P.W.2 would say that she voluntarily went to the house of the accused to play. She would say that she silently followed the accused. But in cross-examination she would come out with a version that the accused dragged her to his

bedroom. Admittedly, there were people collecting water from the public tap in the vicinity of the bedroom of the house. If P.W.2 is to be believed she had cried aloud in which case somebody would have come to know of the occurrence. Going by the testimony of P.w.2 it was she who first gave the statement to the police. But according to the prosecution, it was P.W.1 who first gave the statement to the police. P.W.2 has also admitted that there was a marriage in the nearby house. She has further admitted that the mother of the accused was staying with him. P.W.3 is the elder sister of P.W.2 and it was to her that P.W.2 first revealed about the occurrence. She has also admitted that P.W.2 was voluntarily going to the house of the accused. If so, the prosecution case that the accused enticed P.W.2 is false. DWs 1 and 2 examined by the accused have proved the alibi set up by the accused. If from 10 a.m. to 1 p.m. on that day the accused was attending a wedding elsewhere, the prosecution case that at 10.30 a.m. he had carnal intercourse with P.W.2 from his bed room can only be false. There has been a conscious attempt to suppress the first version given to the police. If P.W.2 is to be believed it was she who gave the first version. But Ext.P1 statement alleged to be the first version is not given by P.W.2 but

by her father, P.W.1. P.W.2 appears to have been tutored by the police. To crown all, there is the irreconcilable contradiction in Ext.P7 certificate of analysis to the effect that semen and spermatozoa were not detected in MOs 1 to 3 although the result of all the tests conducted in the laboratory was positive.

11. I am afraid that I cannot agree with the above submissions. Even assuming that P.W.1 was opposed to the proposal for widening the pathway at the behest of a committee of which the accused was the President, that can hardly be a reason for him to stake the reputation of his own minor daughter with a view to wreck vengeance on the accused. It is true that P.W.1 has admitted that there was an earlier attempt by the accused on his daughter. But that does not mean that P.W.1 was deliberately allowing his daughter to play in the house of the accused. Being a small girl, she would have voluntarily followed the accused on some enticing gesture on the part of the accused. But, since she is a girl of tender age and was aged only six years at the time of occurrence, the conduct of P.W.2 is wholly irrelevant.

12. It is true that the deposition of P.W.2 does not show any *voir dire* examination by the learned Magistrate to satisfy

himself about the competence of P.W.2 to depose before Court. But then the Magistrate has stated in the judgment that P.W.2 was found to be competent to depose. That is sufficient. The testimony of P.W.2 is credible enough to show that the accused had carnal intercourse by inserting his genital organ between her thighs resulting in emission of semen on her thighs. The sexual act committed by the accused clearly answers the description of the unnatural offence in the decision reported in ***ILR 1968 (2) Kerala 605 – State of Kerala v. Govindan Nair***.

13. Coming to the question of Alibi also a reading of DWs 1 and 2 will clearly show that they were turning out to be cunning performers in the witness box with a view to salvage the accused from his criminal responsibility. The burden in this behalf was entirely on the accused. He could have adduced the best evidence by examining members of the household of the person who allegedly got married on that day. No independent witness who attended the marriage was examined to show that right from 10 a.m. to 1 p.m. the accused was busy participating in the marriage.

14. Equally misconceived is the argument that the first version given to the police has been suppressed. No doubt,

P.W. 2 would say that she first gave the statement to the police. But the evidence on record is to the effect that she accompanied her father P.W.1 to the police station and it was P.W.1 who gave the first information statement. There is no inordinate delay also in lodging the complaint so as to view the first information statement with suspicion.

15. The mistake in Ext.P7 report of chemical analysis is also an obvious mistake. A perusal of Ext.P7 certificate shows that as it Phosphatase test, Florence test, Barberio's test and microscopic examination were done for the detection of semen and spermatozoa on MO1 lungi of the accused and MO2 frock and MO3 underwear of P.W.2 and the result of the test was positive. However, while recording the report it was stated that human semen and spermatozoa were not detected on those material objects. P.W.11, the Chemical Examiner who conducted the tests has deposed before court that the results of all the tests were positive and what was intended to be reported was that human semen and spermatozoa were detected in those items and the words *"were not detected"* were mistakenly written. I see no reason to disbelieve P.W.7 against whom no motive whatsoever has been attributed by accused.

16. The trial Magistrate who had the unique advantage of seeing the witnesses and assessing their credibility was inclined to believe prosecution witnesses and discard the testimony of DWs 1 and 2. The lower appellate court also has fully concurred with the conclusions reached by the trial magistrate after a re-appraisal of the oral and documentary evidence in the case. This court will not re-appreciate the evidence and come to a different conclusion sitting in the rarefied revisional jurisdiction. I therefore, do not find any infirmity in the conviction recorded against the revision petitioner.

17. What now remains to be considered is the illegality and extent of the sentence imposed on the revision petitioner. The rigorous imprisonment for two years under Sec. 354 I.P.C. and rigorous imprisonment for three years under Sec. 377 I.P.C. cannot be said to be excessive or disproportionately harsh, having regard to the insatiable lust and perverted sexual hunger exhibited by the accused towards a girl of tender age. The award of compensation also cannot be said to be unwarranted. But the direction that the substantive sentences of imprisonment should run consecutively was uncalled for. I, therefore, direct that the substantive sentences of imprisonment shall run

concurrently. In all other respects, the sentence imposed on the revision petitioner is not interfere with and is confirmed.

In the result, this revision is disposed of confirming the conviction entered and the sentence passed against the revision petitioner but with the modification that the substantive sentence of imprisonment shall run concurrently. In case, the revision petitioner has undergone the substantive sentence as well as the default sentence, he shall be released from prison unless his continued detention is found necessary in connection with any other case.

V. RAMKUMAR, JUDGE.

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